

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Larry Faulkner
Small Business/Self Employed, Electronic Payments
SE:S:CAS:SP:PBR
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Branch Chief, Administrative Provisions & Judicial Practice, Branch 2
(Procedure & Administration)
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subject: Section 6311 and Disclosure of Installment Agreement Payments to Credit Card Companies

This memorandum is in response to an email inquiry from your office dated June 28, 2004, which was forwarded to our office by Donald M. Squires, Chief, Disclosure & Privacy Law, on July 14, 2004.

ISSUE

Whether credit card service providers may disclose to credit card companies that a particular cardholder/taxpayer is using a credit card to make an installment payment of tax?

CONCLUSION

No. Section 6311 generally prohibits any person from disclosing information related to a credit card transaction for the payment of taxes unless the purpose of the disclosure relates directly to processing the transaction. While the exceptions to this rule include disclosures for purposes directly related to statistical risk and profitability assessment, we do not believe that exception extends to disclosing information to determine the creditworthiness of a specific individual, as opposed to the creditworthiness of certain types of transactions.

BACKGROUND

Formerly, American Express did not accept any installment agreement payment charges because it thought taxpayers paying taxes through installment agreements presented too high a credit risk. Earlier this year, American Express considered accepting installment agreement payments if credit card service providers created a separate merchant ID to

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identify when cardholders attempt to make installment agreement payments. American Express stated that they would use this information to 1) determine whether to authorize the transaction and 2) to track the credit performance of American Express cardholders who make installment agreement payments. Subsequently, American Express decided to participate in the installment agreement program and accept charges for installment agreement payments without having service providers separately identify those payments as installment agreement payments

LAW

Section 6311 permits the Service to accept payments of tax by any commercially acceptable means it designates and prescribes in regulations.

Section 6103(k)(9) authorizes the Service to disclose return information to financial institutions and others to the extent necessary for the administration of section 6311.

Section 6311(e)(1) generally prohibits any person who obtains return information relating to credit card transactions from using or disclosing that information for purposes other than those directly related to the processing of the transaction, or the billing or collection of amounts charged.

Section 6311(e)(2)(B)(i) provides an exception to the general prohibition on disclosure of information by authorizing credit card issuers or processors to use or disclose information for purposes directly related to assessing statistical risk and profitability.

Likewise, Treas. Reg. § 301.6311-2(g)(1)(ii)(A) permits the disclosure of information related to credit card transactions in the payment of tax for the purpose of assessing statistical risk and profitability.

Treas. Reg. § 301.6311-2(g)(2)(3) prohibits disclosure of information to a credit reporting agency or credit bureau regarding the use of a credit cards to pay taxes, except for information with respect to the aggregate amount of a cardholder's account, with the amount attributable to payment of taxes not separately identified.

ANALYSIS

Because section 6311(e)(1) generally prohibits any person from disclosing information relating to the payment of taxes by credit card beyond what is need to process the transaction, a credit card service provider may not disclose that a transaction was for an installment agreement payment, unless disclosure of that information falls within an exception to the general rule. The only exception that might arguably apply is the one for disclosures for purposes directly related to statistical risk and profitability assessment. See I.R.C. §6311(e)(2)(B)(i). Neither the statute nor the regulations define the scope of the term "statistical risk and profitability assessment."

We recognize that knowing that a specific cardholder used a card to make an installment payment of tax would enable credit card companies to assess the profitability of accounts held by cardholders who pay taxes pursuant to installment agreements. We do not believe, however, that allowing disclosures for "statistical risk and profitability assessment[s]" was intended allow credit card companies to decide whether to extend credit to a particular person based on the nature of that person's tax liability.

We draw this conclusion, in part, from the prohibition in Treas. Reg. § 301.6311-2(g)(2)(iii), against furnishing credit reporting agencies or bureaus with information about the amount of a cardholder's account attributable to payment of taxes. Thus, the regulations expressly prevent credit bureaus from receiving information that would allow them to base credit reports or scores on specifics related to a person's payment of taxes. By analogy, it would also be improper for a credit card company to base decisions on a cardholder's creditworthiness by considering the specific nature of that cardholder's tax payments that are not needed to process the cardholder's credit transaction.

We also conclude that "statistical risk and profitability assessment" is not to be broadly read, because it might then have no limits. All sorts of information related to tax could bear on statistical risk and profitability assessment with respect to a particular taxpayer. Included among this information would be a person's adjusted gross income, his or her age, the number of dependents, and the types and amounts of deductions. Certainly, however, the fact that this information could be relevant to a credit card company's statistical risk and profitability assessment does not justify the disclosure of that information.

Rather than allowing credit card companies access to information to judge the creditworthiness of a particular individual, we believe the phrase "statistical risk and profitability assessment" generally, if not exclusively, applies to an analysis of a portfolio of debt. Analysis of the account receivables of a credit card company or bank, for example, might be needed with respect to transferring receivables, accounts, or interests therein. See I.R.C. § 6311(e)(2)(B)(ii).

Please contact Administrative Provisions & Judicial Practice, Branch 2, at (202) 622-4940 if you have any additional questions.